IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 895.

SHERMAN L. RUMBERGER, *Petitioner,*

v.

JOHN H. WELSH, PARISE TRUCKING COMPANY, INC., and LOUIS C. PARISE, *Respondents.*

BRIEF OF RESPONDENT JOHN H. WELSH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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May 19, 1943.

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STATEMENT.

The petitioner seeks a review of a unanimous decision of the United States Circuit Court of Appeals for the Second Circuit, reversing a judgment of the District Court of the United States for the Eastern District of New York on the verdict of a jury in favor of petitioner for $15,000, and remanding with instructions to dismiss the complaint as to the respondent John H. Welsh.

The "Summary Statement of Matter Involved", as outlined by the petitioner, by reason of the fact that it emphasizes only certain phases of the case supporting his theory and leaves out among other things the part thereof which had particularly to do with the ruling on the question of independent contractor, we venture to re-state:

The respondent Parise Trucking Company, Inc., (hereinafter referred to as "Company") owned a certain motor truck, together with winchline, boom and other equipment, and had in its employ a chauffeur regularly employed by it to operate said truck and equipment (R. 4; par. "Two" of amended complaint, not denied), who was the third respondent, Louis C. Parise (hereinafter referred to as "Parise").

On the 6th day of September, 1940, and for some months prior thereto, there was in force between the respondent John H. Welsh (hereinafter referred to as "Welsh") and the Long Island Railroad Company (hereinafter referred to as "Railroad") an agreement in writing (R. 15, 436), whereby Welsh agreed to furnish motor trucks and chauffeurs to the Railroad for use in connection with the grade crossing elimination program in the boroughs of Brooklyn and Queens, the trucks to be of various capacities and equipment at specified rates.

On the day of the accident Welsh hired from the Company said truck with winchline, boom and a chauffeur to operate the same (R. 4; par. "Three" of the amended complaint, admitted by failure to deny). Parise was employed by the Company (R. 230) and had been working as a chauffeur for it for some five years previous. (R. 445) The contract between Welsh and the Company was oral, and there was no dispute as to its terms. (R. 19)

On the day of the accident Parise took the truck from the place of business of his employer, the Company, and reported to the office of Welsh (R. 21, 230), and was instructed by Welsh to report to the Railroad at Ozone Park for orders from the Railroad's foreman. (R. 22, 443-44,

445) Arriving at the freight yard of the Railroad at Ozone Park with the truck on that morning (R. 22, 445) Parise was instructed that the truck was to be used to haul reels of cable from the yard to different streets in Woodhaven, Long Island. (R. 445) Petitioner, a lineman employed by the Railroad (R. 26), together with five other fellow employees of the Railroad, were to assist in the loading and unloading of reels. (R. 32, 209) Parise was never permitted to let anyone help or assist in the operation of the winch or boom, and he was "familiar with its operation". (R. 445) Parise operated the winch and boom in loading and unloading the reels and cable and, after two reels were loaded on the third trip, he prepared the winch and boom for travel. (R. 32, 446)

Conn was an employee of the Railroad (R. 196) and was also a lineman (R. 70) and acted as foreman, not only of the Railroad but also of the chauffeur (R. 156, 231), and when he told the chauffeur to do a certain thing, he did it. (R. 156) The boom was lowered by orders of Conn. (R. 249) It is apparent that all orders given to Parise on the day of the accident, except the order given him by Welsh to report to the Railroad, were given by employees of the Railroad. (R. 161)

Conn gave orders how to raise the boom, when everything was secured and when it was all right for the truck to move. (R. 156)

After the reels were loaded the Railroad employees rode on the truck carrying the reels to the place where they were to be unloaded. (R. 86, 446, 453) The truck made two roundtrips uneventfully. (R. 446) It was during the third trip when the two reels were being transported (R. 446) and the petitioner was riding in a sitting position on the floor of the truck (R. 37) that the accident occurred (R. 453). In some manner the steel boom fell, struck petitioner's leg and thereby caused serious injuries, for which the action was brought.

QUESTIONS PRESENTED BY PETITION.

The petitioner states that there are two important questions of federal law presented, as follows:

1. Whether the Circuit Court of Appeals has misconstrued and misapplied the law of New York as established by the decisions of the courts of that State, and

2. Whether the Circuit Court of Appeals had the right to direct the dismissal of the complaint instead of remanding for a new trial, because of the failure of this respondent to comply with Federal Rule 50.

1.

The Circuit Court of Appeals Did Not Misconstrue or Misapply the Law of New York.

The Circuit Court of Appeals, in reversing the judgment of the District Court and ordering the complaint dismissed as to the respondent Welsh, was following the law of New York as set forth in the case of *Irwin* v. *Klein, et al.*, 271 N. Y. 477, decided July 8, 1936. In that case the defendant Paramount Publix Corporation had an agreement with RKO Studios, Inc., formulated in a letter, which read as follows:

> "This confirms our verbal understanding with your Mr. A. Dearholt concerning the taking of certain silent New York atmospheric shots for transparency use in one of your productions.
>
> "We are to furnish you necessary personnel, equipment and materials for the above work, which are to be billed to you at cost plus our service charge of 33% to be invoiced to you at the above address."

and it received from Klein, who was engaged in the business of renting automobiles, an automobile and driver, and put them at the disposal of RKO pursuant to its agreement. The plaintiff was injured as the result of the negligence of

the driver of the automobile while doing work he was directed to perform by RKO.

The question involved was whether all or any of the defendants were liable for such injuries; Klein who owned the car, or Paramount to which Klein furnished the car and driver or RKO which obtained, by contract with Paramount, the "necessary personnel, equipment and material" for the taking of the pictures.

The New York Court of Appeals, in a unanimous opinion, ordered the judgment against Paramount reversed and the complaint dismissed as to it.

This case, and the one at bar, seem to be identical. Substituting Welsh for Paramount, The Long Island Railroad for RKO, Parise Trucking Company for Klein, and Parise for the driver, and we have the identical relationship between the parties as in the case of *Irwin* v. *Klein, supra.* The Court, in its opinion, stated in part as follows (P. 484):

> "Any attempt to reconcile all the decisions of this court would require analysis of the facts in each case. The underlying principles remain constant and in Ramsey v. New York Central R. R. Co. (supra) we said that 'an examination of those cases will disclose that the court has consistently enforced the rule that "the servant of one master to become, for the time being, the servant of another must pass out of the direction and control of the former into that of the latter,"' citing Cannon v. Fargo (222 N. Y. 321). Here we have a practical test, and practical rules have been evolved for its application. 'He is to be deemed the master who has the supreme choice, control and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work but in all its details. * * * The rule now is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division.' (Charles v. Barrett, 233 N. Y. 127, 129.) In the absence of proof that the general employer has surrendered control completely, it must be presumed that his control continued. (Bartolomeo v. Bennett Contracting Co., 245 N. Y. 66.)"

In the present case there was no allegation nor proof that the defendant Parise Trucking Company, Inc. had surrendered control of the truck in question, and it must be presumed that its control continued and that the defendant Parise was furthering the business of his general employer, the Company, nor is there any inference of a new relationship having been effected.

The Court further said (P. 485):

> "Such tests and rules are necessary guide-posts for the proper application of the principles of the law of agency which underlie the rule of respondent superior. They do not change these principles. Liability rests upon the principle that a principal is liable for the acts of his servant when the servant is acting in the business of the employer, within the scope of his employment, and subject to the supreme control and right of direction by the employer. Confusion arises only in definition of what constitutes the 'business' of the employer and what constitutes 'control and right of direction.' Instinct in every contract of employment is the right of the employer to direct the work of the employee and the duty to accept such direction. An agreement to perform work is not in true sense a contract of employment unless the workman is bound to submit to the will of the person for whom the work is to be done, in regard to all the details of the work. Right to specify the work to be done, even right to require that in specified matters the workman shall submit to the will and directions of the person for whom the work is to be performed, is not sufficient to create the relation of master and servant. So long as the workman retains, even with such limitations, the right to determine the details of the performance of the work, he is rather an independent contractor than a servant, and his work, though performed in furtherance of the 'business' of another person, remains the 'business' of the workman."

Under the facts alleged and proven in the instant case, and following the rule of law laid down above, the Company is clearly an independent contractor.

The Court continued (p. 485):

"This same principle of the law of agency must be applied when the contract for work is not made with the workman but with a general employer of the workman. If the general employer's contract is to furnish an employee who will do the specified work under the supreme direction and control of the person for whom the work is to be done, the workman becomes for the time being the servant of the person to whom he is furnished. The general employer's 'business' in the matter does not include the doing of the work. He has no control of the manner in which it is performed, and the workman though hired by him does not act as his agent but as the agent of his employer for the time being to whose orders he must submit. Ordinarily a contract to lease an automobile with the services of a driver cannot be so construed. True, the parties in such case intend that the lessee may have the full use of the automobile, and by the express terms of the contract or by reasonable implication, the right is conferred upon the lessee to direct the driver where, when, and how to drive the automobile; otherwise the purposes of the contract could not be fully carried out. None the less, so long as the general employer retains the right to direct and control in other details the operation of the automobile, the driver remains his servant rather than the servant of the lessee, and the driver's work, though in furtherance of the business of the lessee, is performed in the course of his original employment, and, therefore, in the 'business' of the general employer, who there is acting as a contractor who has agreed to do the work of driving through the agency of one of his servants, rather than as a contractor who has agreed to supply a servant to work in the 'business' of another. Thus in the absence of proof that a lessor of an automobile has surrendered to the lessee complete control and direction of the driver even outside of those matters where direction is a usual detail of the anticipated use, the lessor and not the lessee is the principal of the driver and responsible as such for negligence in the operation of the automobile at least where the accident was not the result of directions given by the lessee. (Cf. McLaughlin v. Audley Clarke Co., 251 N. Y. 507, and cases there cited.)"

There is no proof that the Company had surrendered to Welsh complete control and direction of Parise. Consequently the Company remains the principal of its employee and responsible for his negligence, whereas in this case the accident did not result from any direction given by Welsh.

The Court continued (p. 487):

> "The Paramount Publix Corporation placed the leased automobile and its driver at the disposal of R. K. O. Studios, Inc., for use in taking the moving picture. It did so pursuant to its agreement with R. K. O. 'to furnish necessary personnel, equipment and materials for the above work.' It did not agree to do any part of the work for R. K. O. through its agents or servants. It agreed only to loan its servants and equipment to R. K. O. for use in the business of R. K. O. It hired the automobile and driver from Klein to enable it to carry out its agreement. It surrendered to R. K. O. the same control over the driver which Klein had surrendered to it. Both the express terms of the contract and the manner in which it was carried out show conclusively that so far as concerns the taking of the picture, Paramount's 'business' extended only to furnishing the personnel and equipment, and R. K. O. business began at that point. In that business R. K. O. had sole control and direction and is liable as principal for negligence of its servants. Paramount Publix has no such responsibility."

The following cases are in accord with the foregoing decision:

McNamara v. *Liepzig*, 227 N. Y. 291.
Charles v. *Barrett*, 233 N. Y. 127.
Ramsey v. *New York Central Railroad Company*, 269 N. Y. 219.
Kellogg v. *Charity Church Foundation*, 203 N. Y. 191.
Bartolomeo v. *Bennett*, 245 N. Y. 66.
Wawrzonek v. *Central Hudson Gas & Electric Corp.*, 276 N. Y. 412.

Analysis of Argument and Authorities Relied Upon by Petitioner.

Claim is made that as Welsh was to furnish both truck and driver, he was to furnish service, and therefore Parise was Welsh's employee. This is the same situation that prevailed in the *Irwin* case. There Paramount was to furnish necessary *personnel*, equipment and material, but the court pointed out Paramount agreed only to lend its servants and equipment to RKO for use in the business of RKO.

In the present case Welsh was to furnish "motor truck and chauffeur for use in connection with the grade crossing elimination program in the Boroughs of Brooklyn and Queens, New York City" (R. 436), which was the business of the Long Island Railroad. We submit there is no real distinction.

Petitioner argues that because the trial Judge in his charge to the jury expressed his opinion concerning the work being performed by Parise, without exception, they became the law of the case. While this respondent may not have excepted to *every word* of the trial court's charge to the jury, he did except to every charge given by the court concerning the liability of this respondent for the acts of Parise. (R. 421, 422, 423, 424, 426, 427, 428, 429, 431.)

Under the heading "Control of Employee is Test", petitioner refers to certain cases, but a reading of the cases discloses that the facts in all had no relation whatever to the facts in the present case and do not support the petitioner in the present case.

In the *Matter of Morton*, 284 N. Y. 167, was an appeal from a decision of the Appeal Board granting benefits on an application for benefits under the unemployment insurance provisions of the Labor Law.

The claimant had a written agreement with the respondent to serve as a "Corsetiere", and was granted an exclusive sales territory to sell the manufacturer's undergarments. The agreement provided claimant was to pursue the manufacturer's method of corsetry and salesman-

ship, not to sell any goods but those of the manufacturer's, to furnish the manufacturer of name and address of all clients, to furnish weekly reports in detail showing work performed each day of the week, must work at least thirty hours per week, to begin at 9:00 a.m., to follow routine prescribed by manufacturer's manual of instructions, to deliver each customer a receipt on a form supplied by the manufacturer bearing "Manufacturer's Agreement" and bearing manufacturer's name, to attend sales and instructive meetings conducted by the manufacturer. The Court very properly decided that, based on the facts, the Appeal Board was justified in finding that the claimant was an employee. Petitioner's quotation from the case is merely a reiteration of the law as laid down in the *Irwin* case, which it cites with approval, and in fact supports this respondent's position rather than that of the petitioner. The petitioner's statements that Welsh had power of control over the actions of the driver Parise are his conclusions, not supported by the record and the facts.

The facts in the case of *Standard Oil Company* v. *Anderson*, 212 U. S. 215 (decided February 1, 1909) disclose the case really supports the decision of Circuit Court of Appeals in the present case. Briefly the facts were as follows:

Anderson was employed as a longshoreman by one Torrence, a master stevedore who had a contract with the Standard Oil Company for loading a certain ship. He worked in the hold and, without his fault, was struck and injured by a draft or load of cases which was unexpectedly lowered. The tackle and rope were furnished and rigged by the stevedore. The winch and drum were owned by the Standard Oil Company. All work of loading was done by employees of the stevedore except the operation of the winch, which was done by a general employee of the Standard Oil Company.

The trial resulted in a verdict for the plaintiff. The only question presented was whether the winchman, at the time the injuries were received, was a servant of the Standard

Oil Company or of the stevedore by whom the plaintiff was employed. The winchman was hired and paid by the Standard Oil Company, which alone had the right to discharge him. The stevedore agreed to pay the Standard Oil Company $1.50 per hour for hoisting. He had no control over the movements and conduct of the winchman, except that the hours of labor of the winchman necessarily conformed to the hours of labor of the longshoreman. The winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering, and the winchman had to depend upon signals from others. These signals were given by an employee of the stevedore. The negligence consisted in lowering a draft of cases before receiving the signal.

The Standard Oil Company contended that the winchman, though its general employee, had ceased to be its servant, and had become the servant for the time being of the master stevedore. The Court decided that even though the winchman was doing the work of the stevedore, that is, the work which the stevedore had contracted to perform, he nevertheless remained the employee of the Standard Oil Company. Therefore, the Standard Oil Company was responsible for his negligence.

In the case of *Baldwin* v. *Abraham*, 57 App. Div. 67, decided in 1901, the defendant was the owner of a department store and owned seventy (70) vans, but needed more for its Christmas business, and hired forty-one (41) additional vans from nine different persons and firms. The defendant had its name on the private vans and one of them, while delivering goods for the defendant, was in an accident, causing injuries. There was a great deal of testimony concerning the duties and control of the drivers, and it was admitted that the defendant had full control over the drivers and gave them detailed instructions, directed the drivers and helpers how to load, what to load, when to go, where to go, by what routes and by what reasonable expedition, in fact, the defendant's superintendent admitted that the only

difference observable between the regular drivers and helpers and the temporary drivers and helpers was that the temporary servants naturally required more instruction than the regular ones. In view of the facts in the case, it was only natural that the court should hold that the driver of the van at the time of the accident was the employee of the department store and made the statement set forth in the petitioner's brief.

On page 13 of petitioner's brief the following statement is made:

> "In the trial court the issue of control of Welsh over the actions of Parise was properly left to the jury under appropriate instructions and that issue found against Welsh."

This is not a correct statement. In fact, the court's charge was the very opposite. The court did not charge the jury:

> "If *you believe* from the testimony that the actions of Parise were under the control of Welsh, then you can find against Welsh".

On the contrary, the court charged the jury:

> "Why should Welsh be in the case? This was Welsh's job. Welsh was employed by the Long Island Railroad Company to furnish a truck to haul these cables, and Welsh did furnish a truck. It is true that he hired the truck from Parise, but Welsh furnished it, and it is true that under Welsh's contract the chauffeur was his employee, and it is true that on this type of truck the chauffeur had to run a winch. It seems to me that that does not change the fact that the Parise truck was doing Welsh's work and that Louis Parise as the man in charge of that truck *was* under the dominion and control of Welsh while the work was going forward." (R. 417) (Italics supplied.)

To the foregoing, exception was taken. (R. 421.)

The court further charged the jury at the request of petitioner:

"The Court: 9. The defendant Welsh is responsible for the acts of the chauffeur Parise while he was so engaged. I so charge.

Mr. O'Brien: Exception." (R. 423)

Further statement is made that at a previous trial the issue of control of Welsh over Parise was presented to the jury. Petitioner admits this does not appear in the record, and we do not believe this court is concerned with what may or may not have occurred at a previous trial and has no bearing on the merits of the present petition for writ of certiorari.

The petitioner argues that the "Relationship of master and servant question of fact for the jury", and cites in support thereof the cases of *Johnson* v. *R. T. K. Petroleum Company,* 289 N. Y. 101, and *Shinbaum* v. *Murphy,* 287 N. Y. 529.

There is no inconsistency between the foregoing cases and the decisions in the case of *Irwin* v. *Klein, supra,* and the present case. Both of said cases cite with approval the *Irwin* case wherein the judgment of the trial court was reversed and the complaint ordered dismissed. An examination of the two cases shows as follows:

In the *Johnson* case there was a judgment for the plaintiff by the trial court, the jury having been waived. On appeal, the judgment was reversed, 263 App. Div. 338, and the New York Court of Appeals in reversing the Appellate Division merely decided that the evidence presentd at the trial sustained the finding by the trial court who acted in the capacity of both court and jury.

In the *Shinbaum* case, trial was had before a jury and resulted in a verdict for the plaintiff. On appeal, the Appellate Division affirmed the decision. 262 App. Div. 823. Both courts had held as a matter of law that the party guilty of the negligence was an employee of the defendant and not an independent contractor. The record disclosed that at the trial there was evidence from which the jury

might have found that the person guilty of the negligence was an independent contractor and therefore the New York Court of Appeals reversed the judgment.

Aside from the foregoing, it is indeed a late date for the petitioner to advance the contention that the relationship between Welsh and Parise was a question of fact for the jury. He was perfectly satisfied with the trial court's charge which did not present to the jury any issue of fact as to the relationship between Welsh and Parise.

The record shows that there was no dispute of fact concerning the relationship between the respondent Welsh and Parise, nor was there any issue of fact presented in that respect to the jury. This is clearly borne out by the fact that the trial court, in its instruction to the jury, did not present any such issue of fact to be decided. The petitioner did not request the trial court to give any charge to the jury as to the relationship between Welsh and Parise; on the contrary the charges requested by the petitioner, and granted by the trial court, eliminated any such issue of fact.

Further, based on the undisputed facts in the present case (the entire record was before the Circuit Court of Appeals) the Appellate Court had the right to find as a matter of law that such undisputed facts did not make Parise the employee of Welsh.

The petitioner next injects into the case "The New York City Grade Crossing Elimination Act" and states that there was excluded from the evidence, over his objection, that part of the respondent's contract which required that he have insurance coverage for the benefit of persons while riding upon the trucks. We are quite at a loss to understand for what purpose petitioner injects this into its petition, unless prejudicial, as it is immaterial and has no bearing whatsoever on the merits of the petition.

He further, on page 16, makes the statement that this respondent has been permitted to disregard and escape the responsibilities of his contract by subletting a part of the work to be performed thereunder to another of no proven

financial responsibility or public liability insurance coverage. Here again the petitioner makes a statement of fact which is not in the record, and therefore highly improper, and we do not believe this court will be impressed with a petition which finds it necessary to go outside of the record. The statement could only have been inserted for the purpose of leading this Court to believe that the petitioner will receive no compensation for his injuries unless he obtains a judgment against this respondent. It hardly seems necessary to reply to these irrelevant and immaterial arguments; however, since these arguments have been advanced by the petitioner, the Court's attention is directed to the fact that there is nothing in the record to show that the petitioner cannot collect the judgments which are outstanding against Parise Trucking Co. Inc. and Louis Parise.

The petitioner, by picking out isolated sentences from the decision in the *Irwin* case, attempts to differentiate it from the present case, but the fact remains that taking the decision in the *Irwin* case in its entirety it does, as stated by Judge Swan in the present case, "fits the case at bar like a glove."

The very quotation from the *Irwin* case set out in petitioner's brief (p. 18) shows that the cases are identical.

Welsh surrendered to the Long Island Railroad the same control over the driver (Parise) which the Parise Trucking Company had surrendered to him. The express terms of the contract show conclusively that so far as concerns work on the "Grade Crossing Elimination Program", Welsh's 'business' extended only to furnish motor trucks and chauffeurs, and the Long Island Railroad's business began at that point. In that business, the Long Island Railroad had sole control and direction and was liable for the negligence of its servants. Welsh had no such responsibility.

The petitioner argues (p. 19) that because Parise had sole charge and control over the operation and handling of the boom ("I was never permitted to let anyone help or assist in the operation of the winch or boom and I was familiar

with its operation") (R. 285, 445), he was not under the control of the Railroad Company. This argument does not help petitioner's cause but on the contrary hurts it, as by his own argument petitioner admits Parise was not under the control of the respondent but under the very decided control of his general employer, Parise Trucking Company, Inc.

Under this heading, petitioner again cites the case of *Standard Oil* v. *Anderson, supra,* and sets forth in *part* this Court's quotation from the opinion in *Driscoll* v. *Towle,* 181 Massachusetts 416, but the balance of the quotation is as follows:

> "In this case the contract between the defendant and the electric light company was not stated in terms, but it fairly could have been found to have been an ordinary contract by the defendant to do his regular business by his servants in the common way. In all probability it was nothing more. Of course in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor, if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. *He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do.* There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act." (Italics supplied.)

Applying the foregoing to the present case, Welsh merely instructed Parise to report to the Long Island Railroad for orders, from then on, Parise was not under the order or control of Welsh, but on the contrary was doing the work which his master, Parise Trucking Company, had undertaken to do.

Again on page 20 of the petitioner's brief reference is made to the fact that in the contract between this respon-

dent and the Long Island Railroad Company the chauffeur was to be the employee of this respondent. The actual status of the driver Parise cannot be determined by the contract between this respondent and the Railroad Company, but must be determined solely by the facts and the record shows that the driver Parise was not only in the general employ of the defendant, Parise Trucking Company, but remained in its employ at the time of the accident.

In the case of *Ramsey* v. *New York Central Railroad Company,* 269 N. Y. 219, the plaintiff was an employee of the Kenmore Construction Company which was engaged in the construction of a prison at Attica, New York. At the time of the injury, the plaintiff was engaged in transferring from the yards of the defendant, New York Central Railroad Company, certain pieces of fabricated steel. The defendant owned a crane which was placed on a flat car and was in charge of and operated by one of its servants. The crane was used to move the fabricated steel from the flat cars on to the ground and in the operation thereof plaintiff was injured. The question presented was who was the master at the time of the injury, the railroad company or the Kenmore Construction Company.

The shipment of steel was an interstate shipment and a traffic provision of the Interstate Commerce Commission in effect at the time provided: "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings". It was the contention of the defendant that the traffic provision had the effect, as a matter of law, to change the status of the crane operator from the defendant's servant and make him a special servant of the Kenmore Construction Company as the duty rested upon the latter company of unloading the car, the operator of the crane was engaged in the work of the Kenmore Company and not in the work of the railroad company at the time of the accident. It was further claimed that this traffic provision made it illegal for the railroad to do the

work of unloading the car and that it must be presumed that it was not engaged in doing an illegal act. The Court, in passing on this point, stated as follows: "The fact is undisputed that the respondent's (defendant's) crane was being operated by its servant over whom it retained complete control. *The rule of the Commission cannot change the facts*". (Italics supplied.)

Petitioner's complaint alleges (R. 4) that the driver Parise was in the employ of the defendant, Parise Trucking Company, and regularly employed to operate the aforesaid truck, winchline and boom. This allegation was not denied by any of the parties and was a fact, and the contract between Welsh and the Long Island Railroad Company cannot change the facts.

In *Matter of Fidel Ass'n. of New York, Inc.*, 259 App. Div. 486, affirmed in 287 N. Y. 821, the question involved was whether or not certain salesmen were employees, the association contending that because their contract with the salesmen provided, among other things, "Nothing contained in this agreement shall be construed to create the relationship of employer and employee . . .", that the salesmen were foreclosed from claiming that they were employees. The Court, with reference to said provision of the contract, stated as follows: "The latter provision is not determinative of the relations in the event that the actualities indicate otherwise".

The agreement between the railroad company and Welsh did not create an employer and an employee relationship between Welsh and the defendant Louis C. Parise. In fact, everything in the case including the petitioner's complaint is to the contrary.

Under the heading "Law of New York" petitioner relies chiefly upon the case of *Schmedes* v. *Deffaa*, 214 N. Y. 675 (reversing 153 App. Div. 819, 138 N. Y. Supp. 931, and adopting the dissent of the Court below). This case was decided December 20, 1912 and assuming that the decision by the Circuit Court of Appeals is contra thereto, we sub-

mit the law of the State of New York at the *present time* is as set forth in the decision of *Irwin* v. *Klein, supra,* which decision was followed by the Circuit Court of Appeals.

Petitioner refers to the following cases as having cited *Schmedes* v. *Deffaa, supra:*

LaDuke v. *International Paper Co.,* 17 N. Y. S. (2d) 608; 258 App. Div. 375 (1940).
Enstrom v. *City of New York,* 17 N. Y. S. (2d) 964; 258 App. Div. 672 (1940).
Osborg v. *Hoffman,* 300 N. Y. S. 690; 252 App. Div. 587 (1937).

While it is true *Schmedes* v. *Deffaa, supra,* was cited in said cases, an examination of the cases discloses that they are not in support of the petitioner's position, and in addition, the last two cite with approval *Irwin* v. *Klein, supra.*

In *LaDuke* v. *International Paper Company, supra,* the defendant was the owner of several thousand cords of wood and employed one Tellstone with his truck, as well as ten or more other truck drivers, to haul the wood at so much a cord. During one of the trips by Tellstone an accident occurred and resulted in injuries to the plaintiff. The Court very properly found, based on the facts in that case, Tellstone was an employee of the defendant and liable for his negligence.

In *Enstrom* v. *City of New York, supra,* at the close of the plaintiff's case, motion was made to dismiss as to the City of New York, which motion was granted and on appeal the plaintiff was held *not* to be an employee of the City of New York and the judgment of the lower court affirmed.

In *Osborg* v. *Hoffman, supra,* there was a judgment for the plaintiff and on appeal the Court decided that the plaintiff was *not* an employee of the defendant, and the judgment was reversed and complaint dismissed.

In the case of *Charles* v. *Barrett,* 233 N. Y. 127—decided March 7, 1922, many years after the decision in *Schmedes* v. *Deffaa, supra,* the facts were substantially as follows: One Steinhauser was in the trucking business. He supplied

the Adams Express Company, defendant, with a motor van and chauffeur at the rate of $2.00 per hour. The defendant did the work of loading at its station and unloading at the railroad terminal. It sealed the van at the point of departure and unsealed it at the point of destination. Between departure and destination the truck remained, without interruption and supervision, in charge of the chauffeur. While so engaged, the accident occurred. The trial court ruled, as a matter of law, that the defendant was liable. The Appellate Division held to the contrary and dismissed complaint. The New York Court of Appeals, in an opinion by Judge Cardoza, affirmed the Appellate Division and said in part:

> "We think that truck and driver were in the service of the general employer. * * * Where to go and when might be determined for the driver by the commands of the defendant. The duty of going carefully, for the safety of the van as well as for that of wayfarers, remained a duty to the master at whose hands he had received possession. Neither the contract nor its performance shows a change of control so radical as to disturb that duty or its incidence. The plaintiff refers to precedents which may not unreasonably be interpreted as pointing in a different direction. Minute analysis will show that distinguishing features are not lacking. Thus, in Hartell v. Simonson & Son Co. (218 N. Y. 345) the special employer used his own truck. The submission to a new 'sovereign' was more intimate and general (Driscoll v. Towle, 181 Mass. 416, 418). We do not say that in every case the line of division has been accurately drawn. The principle declared by the decisions remains unquestionable. At most the application is corrected. The rule *now* is that as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division (citing cases)." (Italics supplied.)

In the present case the employee Parise was furthering the business of his general employer, Parise Trucking Company, Inc., by the service rendered to another, Welsh. No command over Parise was surrendered by the company and no inference of its surrender can be drawn from the mere fact that under the contract Welsh had the right to tell Parise where to report for orders with the truck.

It is respectfully submitted that the Circuit Court of Appeals was following the law of New York as set forth in the case of *Irwin* v. *Klein, supra,* the decision in which case has been cited with approval by later decisions of the courts of New York, including the following:

Matter of Fidel Ass'n. of New York, Inc., supra, decided May 15, 1940.
Matter of Radio City Music Hall Corp., 262 App. Div. 593—decided November 12, 1941.
Wawrzonek v. *Central Hudson Gas & Electric Corp.,* 276 N. Y. 412—decided January 11, 1938.
In Re: Wilson Sullivan Company, 263 App. Div. 162—decided April 24, 1941.
Delisa v. *Schmidt, Inc.,* 285 N. Y. 314—decided April 24, 1941.
In Re: Ten Eyck Company, 41 Fed. Supp. 375—decided December 17, 1941. District Court of New York.

and that there is no question presented to justify the granting a writ of certiorari.

2.

There Was a Complete Compliance With Federal Rule 50.

In the outset we wish to call this Court's attention to the fact that this question was not presented to, considered by, nor passed upon, by the Circuit Court of Appeals. The petitioner argues very strenuously that this respondent's alleged failure to comply with the requirements of Federal Rule 50 deprived the trial court of an opportunity to give unhurried consideration to the legal question presented by

the motion for directed verdict. Yet, by his failure to file a petition for rehearing with the Circuit Court of Appeals, he deprived that court of *any* opportunity to consider the question now presented for the first time and asks this Court to rectify his lack of diligence.

Aside from the foregoing and the fact that the new Federal Rules of Civil Procedure were intended to simplify procedure rather than to make it complicated and technical, the record discloses that there was not only a substantial compliance with Rule 50 but a full and complete compliance therewith.

Rule 50 provides as follows:

> "RULE 50. MOTION FOR A DIRECTED VERDICT.
>
> (a) WHEN MADE: EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.
>
> (b) RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was

returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The record discloses that at the close of the plaintiff's case, counsel for respondent moved as follows:

"Mr. O'Brien: Now, on behalf of the defendant John H. Welsh I move to dismiss the complaint against this defendant John H. Welsh upon the ground that the plaintiff has wholly failed to establish any cause of actionable negligence against the defendant Welsh in that the plaintiff has failed to establish that Welsh was in control of the particular truck and its equipment on the day and particularly at the time of the accident, and upon the further ground that it appears that the defendant Parise Trucking Company and Louis C. Parise were in charge and in control and were independent contractors at the time of the happening of the accident; and upon the further ground that there is no proof here that Louis C. Parise was at any time acting as an employee, either general or special employee of the defendant John H. Welsh.

"The Court: I will reserve decision on that. You have stated your motion, have you?

"Yes, I have." (R. 209.)

At the close of the entire case, counsel for respondent moved as follows:

"Mr. O'Brien: On behalf of the defendant Welsh I move to dismiss the complaint against the defendant Welsh upon the grounds, first, that the plaintiff has failed to establish any actionable cause of action against the defendant Welsh, the plaintiff has failed particularly to establish that the defendant Welsh had any control whatsoever over Louis C. Parise. The proof is that he, Louis C. Parise, was in the employ and under the control of the defendant Parise Truck-

ing Company, Inc.; on the further ground that there isn't any proof here that there was any special employment by Welsh of the employee Louis C. Parise, and on the ground, further ground that the Parise Trucking Company and Louis C. Parise were independent contractors." (R. 403.)

The Court denied the motion to which an exception was taken. (R. 403.) Counsel for respondent made the following addition to his motion:

"Mr. O'Brien: May I just add to the motion a motion for the direction of a verdict in favor of the defendant Welsh?

"The Court: Denied.

"Mr. O'Brien: Exception." (R. 403.)

The verdict was rendered on February 16, 1942. (R. 434.)

After the jury came in and announced its verdict counsel for respondent moved as follows:

"Mr. O'Brien: Now, on behalf of the defendant Welsh I move to set aside the verdict as against the weight of evidence under the appropriate section of the Federal Court Code, and on the ground that it is contrary to the evidence, contrary to the weight of evidence and contrary to the law." (R. 434.)

Which motion was denied with an exception. (R. 435.)

The order of judgment, dated February 20, 1942, states in part as follows:

"* * * and the defendants having moved before said District Judge upon the coming in of the verdict for an order setting aside said verdict and said District Judge having denied said motion * * *". (R. 461.)

The petitioner refers to the foregoing as perfunctory.

Can it be said with any degree of fairness that the foregoing was perfunctory? The record shows that from the very outset up to the final close of the case this respondent

repeatedly and vigorously took the position that there should be a directed verdict for him and so informed and moved the court in detail.

The very judgment of the court, rendered four days after the verdict was entered, shows that it had under consideration this respondent's motion to set the verdict aside and that said motion was denied.

The petitioner refers to several decisions of the Circuit Courts of Appeal in support of his contention that in the absence of a motion for directed verdict the Appellate Court cannot pass upon the question and also that specific grounds must be given in support of the motion.

An examination of the cases discloses that they do not support petitioner's contention in the present case.

In *Baten* v. *Kirby Lumber Corp.*, 103 Fed. (2d) 272, the case went to the jury without *any* motion having been made and the court very properly held that Rule 50 does not do away with the necessity of a motion for a directed verdict to raise the legal question as to the sufficiency of the evidence.

In *Woolworth Co.* v. *Seckinger*, 125 Fed. (2d) 97, there was *no* motion of *any* kind for a directed verdict.

In *Emanuel* v. *Kansas City Co.*, 127 Fed. (2d) 175, there was no motion for a directed verdict.

In *Atlantic Greyhound* v. *McDonald*, 125 Fed. (2d) 849, there was a motion for judgment as of nonsuit at the conclusion of the evidence which the court treated as a motion for directed verdict. The Circuit Court of Appeals stated that a sufficient ground for denying the motion was found in the fact that it failed to state the "specific grounds therefor". Can it be truthfully stated from the record in the present case that this respondent did not state in great detail the specific grounds upon which the motion was based. Incidentally, the court did consider the grounds advanced by the motion as set forth in the appellant's brief and stated that said grounds were insufficient for the granting of the motion.

In *Virginia-Carolina Tie and Wood Co.* v. *Dunbar,* 106 Fed. (2d) 383, the motion for a directed verdict was made but there were not *any* grounds stated in support of the motion. Incidentally, the Circuit Court of Appeals went on to state:

> "We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. We doubtless have the power to consider such motion even though the grounds be not stated if in our opinion this is necessary to prevent a miscarriage of justice; * * *"

The court did consider the grounds stated in the brief and found that they were not sufficient to justify the granting of the motion.

It is respectfully submitted that the record in the present case shows the trial court was fully and fairly apprised on numerous occasions of this respondent's position.

The petitioner also refers to the case of *Brunet* v. *Kresge Co.,* 115 Fed. (2d) 713, but a reading of that case also discloses that it does not support the petitioner's position as what the court really decided was since the decisions of this court in *Slocum* v. *New York Life Insurance Co.,* 228 U. S. 364; *Aetna Insurance Co.* v. *Kennedy,* 201 U. S. 389 and *Baltimore & C. Line* v. *Redman,* 295 U. S. 654, the adoption of the new Federal Rules of Civil Procedure has in effect done away with the distinction between cases as to whether or not there was an express reservation of ruling. The court stated: "It appears that the rule seeks to extend and crystallize the practice prescribed in the *Redman* case, hence our directions for dismissal on the merits."

The petitioner states that because this court granted writs of certiorari in the cases of *Berry* v. *United States,* 312 U. S. 450, *Conway* v. *O'Brien,* 312 U. S. 492 and *Halliday* v. *United States,* 315 U. S. 94, writ of certiorari should be granted in this case.

An examination of the records in the foregoing cases discloses there was no motion made after verdict to have same set aside and while we do not believe under the reported decisions including those of this Court as hereafter set forth, that such a motion is necessary, the question is not presented in the present case for the reason that such a motion was made *after* verdict and acted upon by the court.

The latest case that we have been able to find where this question was considered by this Court is *Cassell* v. *Howard University,* 316 U. S. 675, writ of certiorari denied (April 29, 1942), 316 U. S. 711 rehearing denied (May 25, 1942).

It will be noted that the action by this Court denying the writ of certiorari was subsequent to the action by this Court upon the petitions for writ of certiorari in the three cases referred to in petitioner's brief.

The *Cassell* case originated in the District Court of the United States for the District of Columbia. In the trial court the defendant, Howard University, moved for a directed verdict at the close of the plaintiff's case on the grounds of the statute of limitations; and again at the close of the evidence. The court denied the motion. After verdict, defendant moved for a new trial but did not move to have the verdict set aside and judgment entered in accordance with its motion for a directed verdict.

On appeal, *Howard University* v. *Cassell,* 126 Fed. (2d) 6, the plaintiff, Cassell, contended that the Court of Appeals had no right to consider the motion for directed verdict upon the statute of limitations because the defendant had not complied with Rule 50 (b).

The Court of Appeals in denying plaintiff's contention stated:

> "The court denied the motion. After verdict, defendant moved for a new trial but did not move within ten days or at all to have the verdict set aside and judgment entered in accordance with its motion for a directed verdict. However, the defense was not thereby waived and the court's ruling may still be appealed from."

The case was reversed with instructions to dismiss the complaint.

The plaintiff in his petition for writ of certiorari before this Court argued that the Court of Appeals had incorrectly construed Rule 50 (b) and exceeded its power in dismissing the complaint. The plaintiff further argued that he had been deprived of his constitutional right of trial by jury as the case should have been remanded for a new trial.

As stated above, this Court denied the petition for writ of certiorari and also denied the motion for rehearing.

It is respectfully submitted that in the present case there was a complete compliance with new Federal Rule 50 and there is no question presented to justify the granting of writ of certiorari.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari to bring before this Court the decision and judgment of the Circuit Court of Appeals for the second Circuit should be denied.

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